BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MARK D. STRAUSBAUGH	)	
Claimant	)	
	)	
VS.	)	
	)	
GOODYEAR TIRE & RUBBER CO.	)	
Respondent	)	Docket No. 1,016,977
	)	
AND	)	
	)	
LIBERTY MUTUAL INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier request review of the August 2, 2004 preliminary hearing Order entered by Administrative Law Judge Bryce D. Benedict.

ISSUES

It is undisputed claimant suffered injury while operating a machine at work. Respondent argued the claim was not compensable because claimant willfully violated safety procedures when he suffered his injury while cleaning the machine.

The Administrative Law Judge (ALJ) specifically rejected respondent's contention that claimant had willfully failed to use a guard or safety device. The ALJ further determined the respondent failed to establish there was a safety policy regarding claimant's operation of the machine or that, if there was such a policy, it was rigidly enforced. Accordingly, the ALJ ordered respondent to pay claimant temporary total disability compensation as well as provide medical treatment with Dr. Kimball Stacey.

The respondent requests review of whether the claimant's accident was the result of his willful failure to use a guard or safety device or was the result of a violation of respondent's safety policy. Respondent argues that, pursuant to K.S.A. 44-501(d)(1), the claim is not compensable.

Claimant argues there was no rigidly enforced safety procedure regarding operation of the machine and respondent failed to meet its burden of proof that a safety device or guard was provided on the machine. Lastly, claimant notes that even if his actions may have been negligent they nonetheless did not rise to the level of willful conduct. Claimant requests the Board to dismiss the appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the Board makes the following findings of fact and conclusions of law:

Initially, claimant requests the Board to dismiss the respondent's appeal. This is an appeal from a preliminary hearing order. Consequently, not every alleged error is subject to review. The Workers Compensation Act gives this Board specific authority to review the preliminary hearing issues listed in K.S.A. 44-534a, which are:

(1) did the worker sustain an accidental injury,

(2) did the injury arise out of and in the course of employment,

(3) did the worker provide the employer with timely notice and with timely written claim, and

(4) do certain other defenses apply.

And the term "certain defenses" refers to defenses that dispute the compensability of the injury under the Workers Compensation Act.[1] The Board has addressed the "certain defense" language on many previous occasions. The Board has held that a "certain defense," as it applies to K.S.A. 44-534a, is only a defense that relates to the compensability of the claim. For example, the defense raised by the respondent as to claimant's willful failure to use a guard as provided by K.S.A. 44-501(d)(1)(2) is a "certain defenses" that, if disputed, would give the Board jurisdiction to review a preliminary hearing order.

The respondent has raised a "certain defense," i.e., claimant's willful failure to follow safety procedures or claimant's willful failure to use a safety device or guard. If respondent meets its burden of proof on those issues the claimant would be denied compensation. Accordingly, the Board has jurisdiction to review the issues raised by respondent and claimant's request to dismiss the appeal is denied.

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[1] *Carpenter v. National Filter Service*, 26 Kan. App. 2d 672, 994 P.2d 641 (1999).

The parties agree claimant was injured at work on November 17, 2003, while operating a machine that cuts the sidewalls for tires. The issue is whether claimant willfully failed to follow safety procedure when removing a "ball-up" of rubber from the machine. Respondent further argued claimant had to willfully position himself over or under a bar in front of the machine in order to suffer the injury. Respondent argues the bar is a safety guard.

K.S.A. 44-501(d)(1) provides:

> If the injury to the employee results from the employee's deliberate intention to cause such injury; or from the employee's willful failure to use a guard or protection against accident required pursuant to any statute and provided for the employee, or a reasonable and proper guard and protection voluntarily furnished the employee by the employer, any compensation in respect to that injury shall be disallowed.

The foregoing statute is supplemented by K.A.R. 51-20-1 which provides:

> **Failure of employee to use safety guards provided by employer.** The director rules that where the rules regarding safety have generally been disregarded by employees and not rigidly enforced by the employer, violation of such rule will not prejudice an injured employee's right to compensation.

The claimant had shut down the machine to remove a "ball-up" of rubber. After claimant and his co-worker removed the "ball-up" the machine was restarted but a fist size piece of rubber was under the belt and claimant was using an approximate four foot length metal hook to remove that piece of rubber. As claimant leaned forward he was struck on the head by a bracket on the machine. Claimant testified:

> Q. Okay. And I want to make sure I understand how the accident occurred. Was there initially a ball-up?
>
> A. Yes.
>
> Q. And then you shut down the machine?
>
> A. Uh-huh.
>
> Q. And attempted to remove the ball-up?
>
> A. Yes.
>
> Q. And then after - - it was after that when you got hurt?
>
> A. That is correct.

> Q. And when there's still pieces of rubber left in the machine after the removal of a ball-up, how were your trained to remove those pieces of rubber?
>
> A. We were trained to start the motor back up, try to pull it through and to reach in there with the hook or a stick and try to poke it out.
>
> Q. Did that require you to look in?
>
> A. Yes, it did.
>
> Q. You said you worked six years before this accident. Is that how you - - is this the same procedure that you followed before this accident to remove ball-ups and subsequent pieces?
>
> A. That is correct.
>
> Q. Is that how other employees did it?
>
> A. That is correct.[2]

Darrin Liefried was operating the same machine with claimant on the date of the accident and confirmed that the manner in which claimant was attempting to remove the piece of rubber when he was injured was how they were trained. And their training was accomplished by watching the older guys operate the equipment. Mr. Liefried further testified the bars in front of the machine are not safety devices and do not prevent the worker from getting too close to the machine. Conversely, Paul Nutter, respondent's training manager, testified the chest high bar was to prevent the operator from getting too close to the cutting mechanism.

The ALJ's Order provided:

> The Court finds the Respondent failed to prove it had any clear policy against the Claimant acting in the manner he did; in fact the Claimant was doing as he was trained. Furthermore, even if there was such a policy, the [sic] it was generally disregarded by the Respondent's employees and any such rule was not rigidly enforced by the Respondent.
>
> As to the Claimant supposedly circumventing bars in order to reach into the skiver, the Court finds these bars were not safety devices provided by the employer. The function of these bars has not been adequately explained and it has not been established these were intended to prevent employees from reaching into the skiver.

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[2] P.H. Trans. at 43-44.

The Board agrees and affirms.

WHEREFORE, it is the finding of the Board that the Order of Administrative Law Judge Bryce D. Benedict dated August 2, 2004, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2004.

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BOARD MEMBER

c: Bruce A. Brumley, Attorney for Claimant
Patrick M. Salsbury, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director